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## TAKING MORAL ARGUMENT SERIOUSLY

ROBIN WEST\*

In the early seventies, Ronald Dworkin wrote a series of influential essays in which he claimed that legal argument is and ought to be a distinctive sort of moral practice: when done well, legal argument seeks answers to legal questions by interpreting existing legal precedent in light of the best available conception of justice, yielding a morally justified answer to virtually all open questions of law.<sup>1</sup> Legal argument, Dworkin argued, *contra* the prevailing positivist wisdom, uniquely blends legal and moral norms: the best statement of law in any area is inevitably intertwined with the moral norms that animate the general legal field within which the legal proposition has meaning.<sup>2</sup> Furthermore, it is precisely these moral norms, or principles, that render the law *determinate*—it is because of the existence and the force of governing moral principles that legal questions are susceptible to unique and accurate resolution.<sup>3</sup> These moral principles, and their legal status, thus guarantee both the justice of law and the determinacy of our legal rights. They render law both moral and certain.

Moreover, Dworkin eventually went on to claim, the determinacy and the justice of law are interrelated, and in an important way. Law recognizes and enforces our *rights*, in Dworkin's view, and our central, most defining right is our right to be treated equally and with respect by law.<sup>4</sup> That right to equal treatment and respect in turn entails a right to both a definitive and correct adjudication where other rights are called in question: to have one's rights adjudicated in a way dissimilar to the way in which other similar cases were decided, or to have one's rights adjudicated capriciously or prejudicially or whimsically, is a denial of one's basic

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1. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-80, 81-130, 150-205 (1977) [hereinafter *TAKING RIGHTS SERIOUSLY*].

2. See *id.* at 46-130.

3. See Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in *PRAGMATISM IN LAW AND SOCIETY* 359 (Michael Brint & William Weaver eds., 1991).

4. See *TAKING RIGHTS SERIOUSLY*, *supra* note 1, at 272-74.

right to equal concern and respect by law. That right to a definitive and correct adjudication of one's legal rights can, in turn, only be fulfilled by a system of law that has *integrity*:<sup>5</sup> a system that treats similar cases similarly, that is not affected by irrelevant considerations, that holds itself above the sway of partisanship, that treats all cases according to rules and principles that preexist the conflict in question. Without the right to legal judgments that correctly articulate and then enforce our rights, the rights themselves are meaningless. Accordingly, for Dworkin, the determinacy, integrity, coherence, and "wholeness" of law are central to its moral standing and to our status as free and equal individuals deserving its respect. In short, law requires and hence incorporates norms of justice; justice requires determinacy and, therefore, law must be determinate.

In the ensuing twenty-five years, Dworkin's seminal account of the nature of legal argument has been so thoroughly challenged that it is questionable whether it can fairly be called the dominant conception. The most devastating line of attack has targeted Dworkin's claim that moral principles, in conjunction with legal precedent, determine uniquely correct legal outcomes—what Dworkin sometimes called the "right answer" thesis.<sup>6</sup> The counterclaim has been that this assertion simply does not square with the facts. According to his critics, Dworkin is just wrong to insist on the "right answer" thesis, or what others call law's determinacy. Many legal questions, if not most or all, seem to be susceptible to two or more equally plausible legal analyses. If so, then it is hard to see how law can generate determinate answers, guarantee its own integrity, or secure our individual rights to equal treatment in the way Dworkin insists it must.

In this essay, I propose to put to one side, at least initially, the question of law's determinacy, and even its place in Dworkin's jurisprudence. I want to suggest that the question of the law's *determinacy*, itself prompted by Dworkin's "right answer" thesis, has overshadowed what may be the more significant jurisprudential function of the moral principles Dworkin identified: those principles, according to Dworkin, render the law not only determinate, but they

5. See RONALD DWORKIN, *LAW'S EMPIRE* 164-67, 176-224 (1986).

6. Two recent law review symposia have focused on critiques of Dworkin's thesis; see Symposium, *Fidelity in Constitutional Theory*, 65 *FORDHAM L. REV.* 1247 (1997); and Symposium, *In Praise of Theory*, 29 *ARIZ. L.J.* 351 (1997), for articles and responses by Dworkin and his critics.

also render the law substantively *just*. Without the moral principles that are inextricably blended in the fabric of law, Dworkin argued, the law's claim to our obedience would be thin and its claim to our loyalty would be nonexistent.<sup>7</sup> The law that claims our loyalty and obedience is the law that incorporates a decent understanding of the moral principles that find expression within it.

Such law may, but at times may not, be the "law" as articulated by high courts.<sup>8</sup> The legal actor may, but again at times may not, express his or her loyalty to law so understood through compliance with the pronouncements of high legal authorities. The legal actor is loyal to law, principally understood in light of a conception of justice, not positive law as authoritatively pronounced by a court or legislative body. Legal argument, in turn, is the practice that gives daily voice and substance to this distinctively moral loyalty. I will refer to this attribute of the principles Dworkin identified, and more generally to this aspect of his jurisprudence, as the "antipositivist thesis," or more simply, Dworkin's antipositivism. My general claim is that we should be taking Dworkin's antipositivism much more seriously than we do and his claims regarding law's determinism—the "right answer" thesis—considerably less seriously.

To be sure, the antipositivism and the "right answer thesis," in Dworkin's own view, are importantly linked: for Dworkin, a strict legal determinacy is a central, perhaps the central, component of a moral system of law. Without it, law loses its claim to moral legitimacy. Determinacy, for Dworkin, is necessary to law's moral legitimacy and hence to its claim to justice, and it is surely because of that, that his critics have focussed so heavily on Dworkin's claim that morally justified law must be determinate. Nevertheless, both Dworkin and his critics may be wrong to think that justice requires such a high degree of determinacy, and if so, then Dworkin and his critics both may have emphasized the wrong feature of his jurisprudence. We may have been unwise to underplay the implications of Dworkin's antipositivist conception of law, and we may have been led to do so, at least in part, by our obsession with his claim of law's determinacy.

7. See TAKING RIGHTS SERIOUSLY, *supra* note 1, at 206-22.

8. See *id.* at 211.

## I. DWORKIN'S ANTIPOSITIVISM

Let me just spell out three implications of Dworkin's antipositivism, at least the third of which, and possibly the first two as well, have been underexamined in the wake of Dworkin's jurisprudential breakthrough. First, Dworkin's antipositivism implies a distinctive view of legal and judicial authority which we ought to be taking seriously, whether or not we ultimately embrace it: if law incorporates moral principles of justice, then those legal pronouncements of positivistically authoritative political bodies that are substantively *unjust* may be unlawful as well. Positive political authority does not suffice to guarantee legality, if lawfulness requires a minimal threshold of justice. Second, Dworkin's antipositivism implies a distinctive conception of the lawyer's and judge's moral role and duty: if law incorporates moral principles of justice, then the lawyer, as well as the judge, while upholding or articulating the law, is essentially an architect of justice and of a just society, as well as being an enforcer of order, and of an orderly one. As Bill Simon has recently argued, the lawyer, on Dworkin's understanding, ought to view herself as engaged in the zealous advocacy of justice, rather than in the zealous advocacy of her clients' interests, and furthermore ought to act accordingly.<sup>9</sup> And third, Dworkin's antipositivism implies a distinctive conception of legal education and legal scholarship. If legal educators are serious in their pedagogical and scholarly missions, and if law incorporates principles of justice, then it is incumbent upon us as legal educators to develop, debate, sift through, improve upon, dwell on, preserve, learn, and teach, as an integral part of law, competing and credible theories of justice. If law incorporates justice, and if our mission is to teach and study law, then our mission is obviously to teach and study justice as well.

All of these are important consequences, which, if taken seriously, would entail radical departures from practice, as well as from professional habits of the heart and mind. Only a few of us and then only occasionally regard the unjust but authoritative pronouncements of the Supreme Court or of Congress or of the United States Constitution as unlawful *because unjust*, and when any such opinion is asserted, it is typically heard as evidencing the speaker's lack of regard for Rule of Law values.<sup>10</sup> Similarly, lawyers

9. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1998).

10. See Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041 (1987) (discussing then Attorney General Edwin Meese's

do not typically understand their professional duty as running to the zealous advocacy of justice, rather than to the zealous advocacy of their clients' interests. Codes of Professional Responsibility identify the lawyer's duty as running to the client, rather than to justice.<sup>11</sup>

Most important, however, law professors and law schools notoriously neglect the subject of justice, both in teaching and in our scholarship.<sup>12</sup> Possibly the least appreciated implication of Dworkin's antipositivism is that it would force us to correct this: Dworkin's antipositivism, taken seriously, requires us as teachers and scholars and students to develop theories and accounts of justice, as part of our obligation to develop and defend theories regarding the substance of the law. We presently don't do so. Beyond a vague sense that cases ought to be treated alike or in a principled and unbiased manner, we have no developed account of what even the narrow virtue of legal justice might be or of what traits of character it requires, what view of the person it entails, or what kind of society might best facilitate its dispensation.<sup>13</sup> More telling, however, with only a few exceptions, we have no developed or competing understandings of the substantive, legal consequences of various conceptions of substantive, social, or political justice. What does some specified conception of justice imply, regarding the scope of tort, contract, or constitutional law? Doesn't John Rawls' maximin principle, taken seriously and taken as a maxim of justice, suggest the injustice of this culture's maldistribution of wealth, and if we take seriously the suggestion that law must rest on a sound conception of justice, doesn't this suggest the possible unconstitutionality of our current tax system? Doesn't Nozick's historicist understanding of justice imply the moral necessity of reparations to the Indians, to Japanese Americans, and to African Americans, and hence the constitutional necessity of affirmative action? Doesn't even a bare Hobbesian understanding of the requirements of justice underscore familial rights to be free of domestic violence in the home? If we took

advocacy of ignoring non-originalist Supreme Court opinions); Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071 (1987).

11. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1988); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, DR 7-101 (1980); see also SIMON, *supra* note 9, at 26, 40.

12. I've written on this phenomenon elsewhere. See Robin West, *Toward Humanistic Theories of Legal Justice*, 10 CARDOZO STUD. L. & LITERATURE 147 (1998).

13. There are of course important exceptions to this general neglect. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

seriously the idea that legal arguments—whether about the scope of tort law, about the meaning of constitutional rights to equal protection, or the right to property, or to security and safety—must rest on and transparently incorporate a viable account of justice, then a part of the work of law, of the lawyer, and of the law scholar would be to self-consciously trace these implications. With only a few exceptions—Frank Michelman’s early work on the unconstitutionality of disproportionate school funding,<sup>14</sup> Richard Epstein’s early work on the moral foundations of strict liability,<sup>15</sup> and Jules Coleman’s work on the moral foundation of negligence law<sup>16</sup>—we haven’t felt the need to do that. And we haven’t felt the need to do that, in part, because we haven’t taken seriously the possibility that legal argument is or ought to be distinctively antipositivist.

Most generally, if we took seriously the possible antipositivism of legal argument, we would be pressed with the need to articulate the moral *raison d’être* of law and, hence, of lawyering, in a way that either exposed or went beyond the skeletal claim that the purpose of law is to keep the civic peace. If the purpose of law is to secure justice rather than only order, then the professional purpose of lawyering is as well, and if so it behooves us to address the question of what such a commitment requires and what such a commitment might imply for other nonlegal aspects of public or civic life as well. Lawyers, by virtue of our professional and defining commitment to justice, for example, might be fairly expected to take a moral position on issues of foreign policy or domestic questions regarding budgetary priorities, if these issues implicate concerns of justice and if justice is the moral goal of law and lawyering. If justice requires an equal regard for the dignity and worth of *all* individuals, then the current administration’s casual willingness to sacrifice the interests, needs, and lives of Iraqi citizens toward the end of securing American prestige, wealth, or position might be fairly condemned by the legal profession as an unjust and therefore unlawful act. Similarly, the willingness to view the educational opportunities of poor children as a low priority might be fairly understood as skirting unlawfulness—it runs afoul of justice and, hence, of law. If being a lawyer is fundamentally about being

14. See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

15. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 168-69 (1973).

16. See JULES L. COLEMAN, *RISKS AND WRONGS* (1992); Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1991).

committed to justice, then being a lawyer ought to be understood as fundamentally about being committed to securing justice in the face of unjust chauvinist ambitions internationally and aggressive class warfare domestically. The legal profession, if it took seriously the antipositivist understanding of law, could become and could view itself as a bulwark against excessive and unjust patriotic fervor, as well as a bulwark against flagrant injustice at home.

Surely it couldn't hurt, and it might help, to think of lawyers as professionally committed to the project of understanding the prerequisites of justice, in a culture with a legal system that claims to dispense it, and then professionally obligated to either uphold or critique it on the basis of their understanding of the degree to which law meets the demand of justice. Professional philosophers, some theologians, and some political theorists are of course committed to the study of justice, and there is no reason to think that lawyers will be either better suited or more inclined than the average citizen to ponder the relative merits of competing theories of justice. On the other hand, the mastery and application of competing theories of legal and political justice is hardly beyond the competence of any lawyer. And it is hard to think of any group, professional or otherwise, other than lawyers, with the expertise and the professional inclination to work through in a detailed way the implications of various understandings of justice for various doctrinal areas of law. There is no reason, in short, for lawyers not to at least acknowledge the subject of justice as peculiarly within their province. It is a curiosity, and maybe even a scandal, that lawyers in this century have not done so.

## II. INDETERMINACY

In light of these considerations, let me briefly revisit the connection between antipositivism and the indeterminacy thesis. Again, I do not want to argue that the moral principles of justice with which law is arguably intertwined, in Dworkin's jurisprudence, resolve indeterminacy. But I do want to suggest that Dworkin's antipositivism should come as a welcome jurisprudential suggestion to anyone who takes at least one interpretation of the indeterminacy of law seriously. When put forward by most members of the critical legal studies movement, the claim that "law is indeterminate" is not typically put forward as asserting the indeterminacy of legal conclusions; rather, what is typically being put forward is the



indeterminacy of legal *texts*. And, when understood in that way, the demonstrable indeterminacy of legal texts obviously does not imply that legal conclusions are also indeterminate; it implies only that if those conclusions are determined, then something other than the legal texts themselves are doing the determining. In fact, as critical scholars themselves often emphasize, legal conclusions are often depressingly overdetermined even when the texts that conventionally understood should authoritatively compel them are themselves transparently indeterminate. This is not surprising or paradoxical; it simply suggests that something else is doing the determining, other than the texts.

And, what does determine legal conclusions, if legal texts do not? Both realists and critical scholars have supplied a menu of possibilities: conclusions may be compelled, for example, by judicial disposition, by current "belief clusters" held by the ruling judicial class, by rank prejudice, or by some hard-to-specify and perhaps arbitrarily held cluster of judicial beliefs, emotions, and predispositions. But if that's right, then Dworkin's antipositivist thesis might best be understood as a complement to the indeterminacy thesis, rather than (as he himself intended it) as a counterweight: one possible determinant of outcomes that might be added to the list developed by the realists and critics is that legal conclusions, although not compelled by indeterminate legal texts, *are* determined by those texts as interpreted through the lens of some specified conception of political or legal justice. What Dworkin's jurisprudence essentially holds out is the existential possibility that we can, through reason and empathy, *choose* to fill the gap of legal indeterminacy by reference to credible theories of justice, consciously developed, debated, and refined.

Obviously, if one views law as a closed, determinate, positive system of identified and identifiable legal materials, then the insistence that legal conclusions must rest on a synthesis of law and moral principles threatens to undermine that determinacy. But if, on the contrary, one views legal texts as fundamentally indeterminate (as do virtually all members of the critical legal studies movement), then the possibility that legal arguments can render determinate and sound conclusions by synthesizing the indeterminate texts with moral principles should be a welcome suggestion. It suggests the possibility of responding to the necessity of choice dictated by indeterminacy in a way that is both overtly moral and overtly political. It suggests the possibility of responding to the necessity of choice by forging a path

toward justice.

### III. OBJECTIONS TO ANTIPOSITIVISM

All of this, then, suggests a final question: Why hasn't Dworkin's *antipositivism* been taken more seriously? There are a number of reasons. Some are a consequence of arguments with which it was conjoined in Dworkin's original formulation, some a consequence of current political configurations, some attributable, I think, to professional habit, and some that go directly to the merits of antipositivism itself. Let me take them in that order.

First, Dworkin himself initially put forward his antipositivist claim that legal argument incorporates moral principles as a *descriptive* claim about the way law is, as evidenced by the way lawyers actually talk, rather than as a *prescriptive* claim about the way lawyers should talk and the way law should be constructed, and the way law should be understood or interpreted.<sup>17</sup> This was surely a strategic mistake, and possibly a conceptual one as well: the strength of the claim that we *ought* to construct legal argument in a nonpositivist way is surely unaffected by the claim that we presently do so. And, as a descriptive matter, it is not at all clear that lawyers ever talked in such a way as to evidence the antipositivism of traditional legal argument, and it is increasingly clear that even if they once did, they talk that way less and less now, as this current symposium, in part, shows. Justice Antonin Scalia, to name just one prominent lawyer, has expressed in dicta and holding overt hostility toward the view that legal norms require the incorporation of moral principles rather than positivistic authority.<sup>18</sup> Public choice theorists might similarly be expected to question the claim that legal norms require as a condition of their legitimacy some threshold of justice, rather than a credible claim of legislative support. Law and economics scholars tend to interpret legal norms as resting both ideally and in fact on an aspiration of efficiency, understood basically as the maximal satisfaction of desire, rather than on any actual or ideal threshold of justice. More broadly, law students often and perhaps typically find Dworkin's descriptive account of legal argument

17. See TAKING RIGHTS SERIOUSLY, *supra* note 1, at 14-130 (using case-specific examples to refute positivism as a descriptive theory of law).

18. See Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 54-60 (1990) (discussing the opinions in *Saffle v. Parks*, 494 U.S. 484 (1990); *Butler v. McKellar*, 494 U.S. 407 (1990); and *Sawyer v. Smith*, 497 U.S. 227 (1990), as examples of this tendency in Justice Scalia's judicial opinions).

unfamiliar and baffling; it doesn't seem to track their understanding of what they are learning to do in their professional training. There is no indication that the gap is filled upon their entrance to the professional bar.

Of course, Dworkin himself does talk in the way he describes, and he routinely, when writing for the educated lay audience, makes the claim that "lawyers" generally think of law in the peculiarly antipositivist way evidenced by his own writing.<sup>19</sup> Furthermore, he can easily identify at least a handful of cases in which judges do so as well. But the very broad claim that legal argument is through and through antipositivistic in the way that he describes, and that the antipositivism at its core is borne out by the way "lawyers talk" in not just a handful but virtually all cases, is just not borne out by the evidence. Lawyers and courts do of course often identify moral arguments as having a bearing on legal claims, but for the most part they do so in a way that undercuts rather than supports the antipositivism of Dworkin's jurisprudence. Often times, moral arguments are "weighed" as an extra- or non-legal factor that might come to bear in an otherwise underdetermined legal question, and at worst (and not so infrequently) the identification of an argument as "merely" moral, rather than legal, is enough to kill it. Supreme Court candidates, as Dworkin himself laments, routinely disavow reliance on their own moral preferences, political beliefs, or "prejudices," all in favor of what they routinely identify as Rule of Law values that aggressively eschew such an identification.<sup>20</sup> There is very little evidence, if we take lawyers' discourse at face value, to support the broad descriptive claim that lawyers' ways of speaking and thinking about law evidence its antipositivist nature.

There is a second reason, also stemming from Dworkin's own formulation of his position, that has resulted in our subsequent failure to take sufficiently seriously Dworkin's antipositivism. Dworkin's antipositivism is through and through tied to both a general and a particular conception of *rights*, both of which are controversial. At the general level, for Dworkin, law exists (in part) for the purpose of enforcing our moral rights, and at the more specific level, our moral rights consist, in turn, of entitlements not to be treated in certain ways

19. See RONALD DWORKIN, *FREEDOM'S LAW* 306-20 (1996) [hereinafter *FREEDOM'S LAW*]; Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. REV. BOOKS, Aug. 8, 1996, at 44, 50.

20. Dworkin discusses this disturbing phenomenon in *FREEDOM'S LAW*, *supra* note 19, at 306-20 (terming the phenomenon "the neutrality-thesis").

by the state.<sup>21</sup> Our rights follow, in other words, as entailments from a set of behaviors in which states, as a matter of political morality, may not engage. What it means to have a "right" is to have an entitlement not to be treated in a particular way by the state. Therefore, the justice that law must incorporate as a condition of its own legality and legitimacy is essentially a set of prescriptions against certain forms of state actions, with correlative individual rights. The antipositivist jurisprudential claim is then substantiated by a particular, and particularly liberal, understanding of the relation of the individual and the state and of the role of rights and of law in mediating that relation.

However, neither the liberal insistence on the centrality of rights, nor the liberal (or libertarian) understanding of rights as essentially negative claims against certain forms of state action, is universally shared by lawyers or even by the subset of lawyers for whom Dworkin's descriptive claims about legal argument and legal practice might ring true. For anyone who does not share Dworkin's basically liberal view that the enforcement of rights is the highest function of law, and the libertarian sounding claim that rights are essentially prescriptions against certain forms of unjustified state action, the Dworkinian conclusion that law necessarily incorporates a liberal understanding of rights, of the individual and of the state, will seem wrong and even imperialist, and antipositivism will bear the brunt of this judgment. If for example, one holds the nonliberal view that the highest function of law is not the enforcement of negative rights against the state but the articulation of communitarian duties, or the processual mediation of conflict, or the guarantee of safety or welfare, or the enforcement of positive rights, and if one accepts the Dworkinian claim that jurisprudential antipositivism *requires* the centrality of negative, liberal rights, then its a short step to the conclusion that something must be very wrong with antipositivism. If negative rights constitute the logical bridge, so to speak, between the worlds of positive law and of moral right, then the two worlds might be better left logically separate. We might then form, rather than discover, a bridge of some other constructed, rather than logical substance.

The third reason has to do with professional norms and habits. As students almost invariably complain, the Dworkinian understanding of law as necessarily resting on a concept of justice is seemingly at

21. See TAKING RIGHTS SERIOUSLY, *supra* note 1, at 266-78.

odds with even the highest self-understanding of the practicing bar, to say nothing of the actual practices. Lawyers are explicitly commanded by various Codes to treat the zealous advocacy of their clients' interests, not their own best understanding of the requisites of justice, as defining the contours of their distinctively professional moral responsibility. If lawyers are to read the law through the lens of client interest, that is one thing, but if they are to read the law through the lens of the best concept of justice available, that is another, and there is no guarantee, and really no reason to think, that these two interpretive methods will yield results that have anything at all to do with one another. It is unrealistic to expect lawyers to do the impossible. One or the other of these ethical precepts must yield. So long as Codes of Responsibility are taken seriously, justice will not be, wherever the two constraints lead to conflicting results.

The fourth reason Dworkin's antipositivism has been relatively under-theorized is at the same time both conceptual and political, and goes to the logic and politics of antipositivism itself. As Bentham noted two hundred years ago, the antipositivist claim that law incorporates justice can veer toward either an extreme and conservative overidentification of the legal status quo with the morally right<sup>22</sup>—if law requires a minimal threshold of justice, then all extant law must be just—or at the other pole, a radical or anarchic identification of the positive extant state and its legal pronouncements with lawlessness and the identification of true "Law" with some utopian understanding of legal perfection. Either extreme interpretation, of course, would be politically and morally troubling, but when the practitioner is a constitutional lawyer, or a class of constitutional lawyers, who are themselves obviously and thoroughly identified with and relatively comfortable with the legal ruling class (rather than, say, a revolutionary or civil disobedient), the risks associated with the former interpretation—the overidentification of extant law with ideals of justice—is far greater than the risk of anarchy posed by the latter interpretation. And Dworkin's writings do little to assuage the worry. Surely, what is most troubling about Dworkin's writings and what leads many of us to recoil from his antipositivism is the danger that he has romantically but wrongly identified "American constitutional law," however it be determined, with moral truth and political justice. It is, after all, one thing to urge

22. See JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 10-13 (J.H. Burns & H.L.A. Hart eds., 1988) (1776).

legal practitioners to read existing law in as morally just a way as possible and to try to instill such an ethic as a professional standard. It is another thing entirely, though, to urge that extant law is by definition already just. The first is an attempt to enlist the legal profession as a matter of professional identity in the cause of achieving justice through law, in part through the hermeneutic practice of interpreting it as generously and justly as possible. The second, and equally plausible, interpretation of Dworkin's antipositivism, however—the insistence that extant law (best understood) is already just—sounds like a casual capitulation to the temptation to view that which “is” as necessarily “good.” It is, in other words, a capitulation to the forces of legitimation.

The political problem, in short, with Dworkin's antipositivism is simply that the difference between these two ways of understanding what he is trying to make us do—to move the law hermeneutically toward justice or to assert the extant law's necessary justice—is largely a matter of *attitude*, not logic. A reformist or liberal lawyer will interpret the mandate as one to refashion existing law in a just manner; the conservative or regressive lawyer will interpret the mandate as insisting on the justice of the status quo. It is likely the case that lawyers are attitudinally a relatively conservative group. It is not surprising then, that in spite of his evident liberal political stance, Dworkin's antipositivism is widely regarded by at least some of his critics as having a conservative and even Burkean flavor that renders it unacceptable, at least in times of law's manifest imperfection.

Finally, and I think most importantly, Dworkin's antipositivism has failed to take hold as even a normative ideal because it requires the legal profession—academics, law students, lawyers, and judges—to take moral argument seriously, and this is something we are neither culturally nor professionally inclined to do. Lawyers are if anything more inclined than other professionals or academics to be in the grip of the prevailing moral relativism that now dominates both the left and right political wings of the academy, and to a lesser extent of popular culture as well: for the libertarian right, moral truth is nothing but the satisfaction of as much desire as possible, through free markets ideally, and through regulatory anticipation of market outcomes where markets are impractical, and to the critical left, moral truth is a perception created by shifting forces of political power. Moral argument, as a practice, is regarded seriously by neither wing, and the wings embrace more than a few. We are habitually, and professionally, and increasingly intellectually, skeptical of the claim

that justice can be understood, analyzed, or debated in rational form, and are even more skeptical of the claim that our sense of justice can or should be informed by generous moral sentiments. Against this backdrop of moral skepticism, the antipositivist suggestion that legal argument can lead to morally justified conclusions through the incorporation of a moral theory of justice, threatens hypocrisy, confusion, imperialism, legitimation, or obfuscation. If “moral truth” is a mask for political power in turn propelled by the will to dominate, or alternatively if claims of moral truth do nothing but frustrate the satisfaction of desire, hence standing in the way of the creation of value, then a theory of law which incorporates such truths has nothing to offer but, in essence, villainy. It either perpetuates the ill-disguised designs of the powerful or frustrates for no reason the creation of value through the maximal satisfaction of the desires of all. Because it forces us to take moral argument seriously, Dworkinian antipositivism is at odds with the fundamental impulses of critical and economic legal scholars both.

None of these reasons, in my view, constitute sound arguments against the *prima facie* case for taking Dworkin’s antipositivism seriously. The possibly false descriptive claim—that lawyers do presently talk in such a way as to evidence the antipositivism of legal argument and legal conclusions—as I suggested above,<sup>23</sup> is in no way a necessary element of the prescriptive claim that lawyers ought to do so and could be trained to do so. In fact, the falsity of the descriptive claim makes the appeal of the prescriptive claim all the more evident. The further we move away from the kinds of legal arguments Dworkin thinks we do make, in other words, the more attractive the form of argument he’s urging upon us seems to be. As legal argument becomes more and more positivistic, contrary to his descriptive claim, the appeal of antipositivism seems greater and greater.

Similarly, there is no necessary connection between what we might call Dworkin’s rights thesis and his antipositivism. It may be that the concept of “rights” is *one* way of bridging the gap between legal and moral norms but it is not the only way. Furthermore, even if we accept the Dworkinian rights thesis—that the nature and existence of rights belies the positivist separation thesis—there is no reason to accept his essentially libertarian understanding of rights as consisting exclusively of entitlements to be free of certain forms of pernicious state action. Dworkinian antipositivism is a logical vessel that can

23. See *supra* text accompanying notes 19-20.

obviously be filled with any of a range of competing moral conceptions of justice. There is no necessary connection between antipositivism and liberal legalism—although it may be true, as Dworkin has indefatigably argued—that liberal legalism is itself an antipositivist jurisprudence. And there most assuredly is no necessary connection between liberal legalism and a libertarian or negative understanding of the essence of rights.

Third, that the moral self-understanding of the profession, as well as their practices and governing Codes, reflects a professional ethic of zealous client advocacy that is at odds with the Dworkinian antipositivist conception of law, might suggest a reason to be skeptical of Dworkinian antipositivism, but it might as well suggest a reason to change the professional practices. It is beyond the scope of this essay to discuss the merits of the latter strategy. Bill Simon's recent study, *The Practice of Justice*, however, amply demonstrates at least the viability of such an approach: he argues that it would not only be desirable, but it would be more than possible, to change the Codes and the practices they govern to reflect an antipositivist (which he calls "substantivist") Dworkinian understanding of law and justice, rather than a relativist and adversarial understanding.<sup>24</sup> There are problems with both Simon's proposal and its Dworkinian underpinnings which I've written on elsewhere<sup>25</sup> and won't belabor here, but it minimally evidences the possibility of turning the incompatibility of antipositivism and professional ethics into an argument against the latter, rather than a hammer with which to bludgeon the former.

Fourth, the possible conservatism of antipositivism is also not a sufficient reason to dismiss at least Dworkin's version of it and for at least two reasons. First, it may be the case that Dworkinian antipositivism can lead to the wrongful identification of law with justice and hence to an unjustifiably complacent legal profession. But positivism *also* carries a political risk of unwarranted moral complacency by the legal profession toward the status quo. While the Dworkinian antipositivist's complacency is legitimated by his insistence that law is necessarily just, the positivist's complacency is legitimated (potentially) by his insistence that "law is law" and *that is all there is*; that moral norms, by virtue of their nonlegal nature, have

24. See SIMON, *supra* note 9, at 37-42.

25. See Robin West, *The Zealous Advocacy of Justice in a Less Than Ideal Legal World*, 51 STAN. L. REV. 973 (1999).



*no* nature, no force, and at any rate, no relevance to his work as a lawyer. Both positivism and antipositivism, as jurisprudential stances, are compatible with undue complacency and can become instruments for the legitimation of a considerable degree of injustice: antipositivism potentially does so by equating extant law with justice, positivism potentially does so by denying the existence, force, or relevance of nonlegal moral truths. It follows as a matter of simple logic that it is something other than jurisprudence that determines the critical acuity of the professional.

But furthermore, Dworkin's antipositivist thesis, or at least one possible interpretation of it, might not be at odds with the best understanding of legal positivism. Dworkin's antipositivism concerns the nature of legal argument and legal conclusion: legal argument, when done well, synthesizes the extant legal authorities with the best available conception of legal justice, yielding correct and justified legal conclusions. Legal positivism, best understood, asserts that even the best, most generous, most morally appealing interpretation of law should not be confused with moral truth and that to do so seriously undermines the possibility of responsible moral criticism of law or of power. Nothing in Dworkin's internal understanding of the nature of legal argument undermines this critical positivist insight. It may be, as Dworkin argues, that we should (and sometimes do) as lawyers, make legal arguments on the basis of a synthesis of legal authority and moral argumentation. It may also be, as positivists insist, that the resulting conclusions, as well as their statutory and common law bases, should not be confused with moral truth. They should be understood, rather, as the legal professional's best attempt at making good moral sense of extant legal materials. If those legal materials are through and through base, or unjustifiable, or evil, then even the legal professional's best attempt at making good moral sense of them will presumably fall far short of morally justifiable outcomes. The moral critic, standing either outside or inside the profession, is not necessarily in danger of confusing legal outcome with moral truth simply because the Dworkinian lawyer seeks to synthesize them or to bring them into harmony.

If that's right, then positivists, although seemingly paradoxically, may have a stake in taking Dworkin's antipositivism seriously. To a substantial degree, the legal positivist's jurisprudential insistence that moral truth must be kept theoretically "separate" from legal mandate is prompted by the moral impulse to preserve the intellectual coherence of the moral criticism of law. But such an impulse might be

strengthened, rather than weakened, by the Dworkinian insistence that the legal professional, acting as a professional, should seek to synthesize the two. The lawyer who tries to do so, after all, unlike the lawyer who denies the need or importance of claims of justice, will at least attune herself or himself to the realm of moral argument, moral truth, and claims of justice. It's at least possible that the lawyer who develops a professional sensitivity to such arguments will also be sensitive to the degree—and it may be considerable or negligible—to which a synthesis of law and justice cannot be forged, because of the rockbottom immorality or injustice of existing law. The lawyer who seeks to synthesize law and justice in the antipositivist spirit urged by Dworkin may be better suited to, not disabled from, the essentially Hartian task of identifying, and protesting, the injustice of law, where such a synthesis is clearly beyond the realm of legal possibility.

Lastly, that Dworkin's antipositivism forces the legal profession and academy to take seriously the project of objective moral argument is surely a virtue and not a vice of antipositivist jurisprudence. Our refusal to do so over the last thirty years has left us with unpalatable alternatives: the nihilist insistence on the left that all there is in the social world worth pondering is power; the libertarian insistence on the right that all that can be justified is the satisfaction through market mechanisms of desire; and the fundamentalist and generally religious-based claim that the authority for moral truth must come from not just extra-legal but extra-human sources. These stances cannot possibly yield theories of justice, or moral truth, sufficient to ground morally compelling legal arguments. We know this and as a result have eschewed the project of justice altogether. As a result we have created an academic and professional world void of any sense of virtue and even ignorant of the competing possible conceptions of the virtue of justice that at least in the eyes of others ought to be the defining virtue of the legal profession and legal academy both. We have even managed to create, in the minds of many, a falsely sophisticated impression that these lackings are signs of intellectual maturity. But they are not; they are signs of the intellectual backwardness, the moral narcissism, or at best, the childishness, of a profession that refuses to engage the work of deliberating over the social good and the legal right and its own place in the societal work of securing both. We need to correct this quite disastrous professional and intellectual misstep. Until we embrace the work of taking moral argument seriously, it will be very hard to take

legal argument (or lawyers) seriously and it will be even harder to understand why we, or anyone else for that matter, should.